No. 48673-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

B.S.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Schaller, Judge
Cause No. 15-8-00410-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether this court should address the substantive issue in the case, which the appellant concedes will be moot by the time the court considers it.

2. Whether substantive due process requires that a juvenile be enrolled in the specific treatment program ordered by the court at disposition, even if the juvenile is unable to adequately participate in that program, and another program, to which the juvenile is better suited and which offered greater services, is substituted.

B. STATEMENT OF THE CASE.

The State accepts the Appellant's statement of the case. Additional facts will be included in the argument below.

C. ARGUMENT.

1. This case is moot and there is no reason for this court to decide the issue of the due process right of one juvenile to specific treatment programs in juvenile court.

B. S. acknowledges that she will have completed her obligations under the disposition order before this court will have the opportunity to address her claim. The juvenile court cause number expired on August 6, 2016. CP 55. Still, she argues that even though her case is moot, it should be reviewed because "the error is 'capable of repetition, yet evading review.'" Appellant's

Opening Brief at 8, quoting In re Marriage of Irwin, 64 Wn. App. 38, 60, 822 P.2d 797 (1992). The State disagrees.

"It is a general rule that, where only moot questions or abstract propositions are involved . . . the appeal . . . should be dismissed." Sorenson v. Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). An exception is made for "matters of continuing and substantial public interest." Id. In Hart v. Dep't of Soc. & Health Servs., 111 Wn.2d 445, 759 P.2d 1206 (1988), the court observed that the use of this exception had become increasingly common in the previous 15 to 20 years. Citing to Sorenson, the court listed the three essential factors to be considered: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." Hart, 111 Wn.2d at 448. "Arguably," a fourth factor may be considered, the "level of genuine adverseness and the quality of advocacy of the issues." Id.

After conducting a survey of moot cases that had considered the various factors, the court in Hart observed that the public interest exception had been increasingly applied "without rigorous examination and application of the *Sorenson* criteria." Id. at 450.

> The increased use of the exception threatens to swallow the basic rule of not issuing decisions in moot cases. Actual application of the *Sorenson* criteria to each case where the exception is urged is necessary to ensure that an actual benefit to the public interest in reviewing a moot case outweighs the harm from an essentially advisory opinion.

Id. at 450.

Hart had asked the court to apply the "capable of repetition, yet evading review" exception which was adopted by the United States Supreme Court in Murphy v. Hunt, 455 U.S. 478, 482, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982). The Hart court declined to do so, concluding that even if it did, it would not apply in Hart's case. Id. at 451. "The Supreme Court has stated 'a mere physical or theoretical possibility' is not enough to meet the 'capable of repetition, yet evading review' standard. . . It has required a 'reasonable expectation' or a 'demonstrated probability' that the controversy will recur involving the same complaining party.'" Hart, 111 Wn.2d at 452, citing to Murphy, 455 U.S. at 482.

B. S. asks this court to make a decision about whether she has a due process right to a specific treatment program, even though she was provided a different program which was considered to be more available to her and more suitable to her needs. The chance that this "same controversy" will recur in her case is zero.

Nor has she shown that it is has occurred, or is likely to occur, in a number of other juvenile cases sufficient to raise the question to the level of a public issue, making future guidance to public officials a benefit. The record shows only that one juvenile was ordered by the adjudicating court to be evaluated for Aggression Replacement Therapy (ART) and comply with all treatment recommendations, CP 16, and that the juvenile was placed in Multisystemic Therapy (MST). RP 5.[1] There is nothing more than a theoretical possibility that the same situation will recur.

This case does not meet the requirements of Sorenson and the appeal should be dismissed.

2. The juvenile court did not violate the appellant's due process rights by declining to order that she be provided the A.R.T. program.

B. S. argues that she has a due process right to be enrolled in the A.R.T. program, which was ordered in her adjudication order. CP 16. "B.S. was entitled to be evaluated for A.R.T. because it was ordered as part of her disposition." Appellant's Opening Brief at 6. In fact, a box is checked on the disposition order for the following condition:

1 All references to the Verbatim Report of Proceedings are to the transcript dated February 28, 2016.

> Anger/Aggression Treatment: Respondent shall be evaluated for and comply with all treatment recommendations of Anger Management or Aggression Replacement Therapy ("A.R.T.").

CP 16. While the record is unfortunately sparse, it appears that B.S. was evaluated for A.R.T. and it was decided that she needed a greater level of care than A.R.T. provided. RP 6. The disposition order does not require that B.S. take part in A.R.T. no matter what. It orders that she comply with all treatment recommendations, and the recommendation was that she needed the more intensive M.S.T. program. RP 6.

To support her argument, B.S. cites to State v. S.H., 75 Wn. App. 1, 877 P.2d 205 (1994), *review denied*, 125 Wn.2d 1016, 890 P.2d 20 (1995), and State v. J.N., 64 Wn. App. 112, 823 P.2d 1128 (1992). S.H. was addressing a manifest injustice disposition; the court said that the Fourteenth Amendment guarantees juveniles a due process right to "adequate treatment." S.H., 75 Wn. App. at 19. J.N. does not specifically talk about due process.

There are two kinds of due process—procedural and substantive. "The basic requirements of procedural due process are notice and the opportunity to be heard." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15, 70 S. Ct. 652, 94

L. Ed. 2d 865 (1950). "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Amunrud v. Board of Appeals, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006). Presumably B.S. is speaking of substantive due process, since she is complaining not of lack of notice or an opportunity to be heard, but of the decision made at that hearing.

The first question, then, is to define exactly what "liberty interest" is being protected by substantive due process. Braam v. State, 150 Wn.2d 689, 699, 81 P.3d 851 (2003). That case was deciding whether the State's foster parent program violated the rights of children in foster care. In that context, children had a due process right to "be free from unreasonable risks of harm and a right to reasonable safety." Id. at 700. "Ultimately, substantive due process is violated if the executive action shocks the court's conscience; both standards [deliberate indifference and professional judgment] are tailored to assist courts in evaluating executive action in specific factual contexts." Id.

Juvenile offenders are entitled to "adequate treatment." S.H., 75 Wn. App. at 19. The Juvenile Justice Act requires that the specific needs of the offender determine the appropriate treatment

to be provided. Id. at 20. As noted, the court in S.H. was addressing manifest injustice dispositions, but it observed that

> It will always be possible for juveniles committed to DJR to show that different, additional, or better treatment is needed or desirable.

Id.

> S.H.'s objection that he is not receiving the exact treatment recommended by [the social worker] has a fundamental flaw. It erroneously assumes that when the trial court relied on the treatment recommendation, that disposition incorporated specific treatment recommendations which then became binding on DJR. We will not second guess DJR's professional treatment decisions absent the showing discussed above [that S.H. prove his treatment was clearly inadequate].

Id. at 21.

The legislature has directed the juvenile system to respond to the needs of the juvenile offender. State v. Rice, 98 Wn.2d 384, 393, 655 P.2d 1145 (1982). "Treatment" is not defined, nor limited to any specific type of treatment. Id. Appropriate treatment is that which meets the needs of the juvenile. Id.; J.N., 64 Wn. App. at 117.

The record in this case shows that B.S. was offered M.S.T. rather than A.R.T., and that at the time of her probation violation hearing she was almost through with M.S.T. and was looking to

begin Wraparound With Intensive Services (WISe), a program which provides in-home services. RP 11, 18. Although the M.S.T. counselor was not familiar with the specifics of A.R.T., she testified that M.S.T. addressed the entire family system, not just the problems of the juvenile. RP 11. It offers more options than A.R.T. does. RP 14. The counselor said that A.R.T and M.S.T. have some similar components. RP 13. Even if A.R.T. had been an appropriate program, B.S.'s mother was unable to get her to the courthouse for the classes. RP 11.

While it is true that there were problems with transportation, B.S. had made improvements while in the M.S.T. program. RP 9-10. There had been decreases in the amount of conflict both at home and at school. RP 10. The anticipated WISe program participation would, in the counselor's opinion, assist B.S. in developing the skills she still needed to acquire. RP 12.

In short, substantive due process requires that the State provide effective treatment tailored to the needs of the juvenile. It does not necessarily guarantee that the juvenile is provided a specific treatment program, even if that program is named in the disposition order. In this instance, B.S. was offered the most effective treatment option available. Her transportation problems

were an obstacle no matter which program she was in. The record shows that M.S.T. is a more comprehensive treatment program than A.R.T. Not only has due process been satisfied, but returning B.S. to juvenile court to participate in a program already deemed unsatisfactory would not only be a waste of scarce resources, but would convey to B.S., if not the public at large, that the juvenile system values form over substance.

D. CONCLUSION.

The claimed error raised in this appeal is moot, and there is no justification for addressing it. Even if the court does consider the issue raised, it has no merit. The decision of the juvenile court should be affirmed.

Respectfully submitted this 22d day of September, 2016.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of September, 2016, at Olympia, Washington.

Cynthia Wright

CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTOR

September 22, 2016 - 2:50 PM

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